Clark Distribution Systems, Inc. *and* Patrick Anthony and Jason Lamatsch. Cases 13–CA–38348–1 and 13–CA–38348–2

October 1, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On December 29, 2000, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judges' rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

This case involves allegations of violations of Section 8(a)(1) and (3) of the Act arising in the context of an unsuccessful union organizing campaign. The judge found that the Respondent violated the Act in three respects, and the Respondent has filed exceptions. As discussed below, we adopt all three of the judge's unfair labor practice findings.

Background

The Respondent, Clark Distribution Systems, Inc., is a distributor of printed material, operating facilities in Scranton, Pennsylvania; Nashville, Tennessee; Kansas City, Kansas; and Matteson, Illinois. This case concerns the warehouse employees at the Matteson facility.

Teamsters Local Union No. 710, AFL–CIO (the Union), conducted an election campaign in 1997. After the Union lost the election, the Respondent established a joint committee of managers and employees to address employee concerns. In late April or early May 1999, employees Patrick Anthony and Michael Washington began another organizing campaign. The Union lost the August 13, 1999 election.

In November 1999, the Respondent decided to transfer work from Matteson to its Kansas City facility.[3] Thereafter, the Respondent decided to reduce the Matteson work force by nine employees. In January 2000, it offered a severance package to the first nine employees to accept the offer. In general, the severance package provided for 40 hours' pay for each year worked for the Respondent, and required employees to resign their positions and sign a release. The Respondent indicated that, in the event fewer than nine employees accepted the severance offer, it would lay off employees to reach its goal of reducing its work force by nine employees. The Respondent advised that the selection of employees for layoff would be based on the number of disciplinary writeups received in 1999. Only three employees, Fred Otte, Carl Schaff, and an unnamed employee accepted the severance package. The Respondent then selected for layoff the six employees with the most disciplinary writeups in 1999.

The judge found that the Respondent violated Section 8(a)(1) by soliciting employee grievances during the election campaign and promising to remedy those concerns. The judge further found that the Respondent violated Section 8(a)(1) by conditioning acceptance of the severance package on the requirement that employees not participate in the Board's investigative process. Finally, the judge found that the Respondent violated Section 8(a)(3) by devising and executing a discriminatory scheme in order to rid itself of union supporters. We shall address each of these findings below.

I. SOLICITATION OF GRIEVANCES

The Company's president, Tim Teagan, and vice president, Robert Marcy, each approached employee Antwion Lee during the week before the election. Marcy asked Lee, "What is going on around here?" In response, Lee stated that he was concerned with work rules. Marcy told Lee that, "we could work together for the rules to be suitable for everyone." On the same day, Teagan also asked Lee, "What is going on around here?" Lee then told him that he had problems with the work rules, and Teagan said that the employees make the rules. Lee also complained about wages and unfair treatment. Lee said that it was not personal against the Company, but he had to do what was right for the family. Teagan agreed that it should not be something taken personally.

The judge found that the Respondent violated Section 8(a)(1) of the Act by soliciting grievances from Lee and promising to remedy them. The Respondent has excepted to the judge's finding. We agree with the judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[3] The General Counsel does not allege that the transfer of work was unlawful.

The relevant principles were summarized in *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994), as follows:

> Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one[.]

Applying these principles here, we agree with the judge that the Respondent violated Section 8(a)(1) by soliciting grievances and implying that they would be remedied. Contrary to the Respondent's contention, the record does not show that its high-level officials had a previous practice of individually soliciting grievances from employees on the warehouse floor. Rather, the record shows that employee grievances were usually addressed through another channel, i.e., the joint committee of employees and managers.

Further, when considered in context, the Respondent's conduct cannot be dismissed as innocuous merely because the inquiries were general in nature and the Union was not explicitly mentioned. As the judge pointed out, President Teagan and Vice President Marcy admitted to visiting the plant to speak with employees in response to the union organizing drive, and employees understood this fact. Both Marcy and Teagan permitted Lee to express his grievances and gave no indication that Lee had misunderstood the nature of their inquiries. See *Palm Gardens of North Miami*, 327 NLRB 1175, 1185 (1999) (where high-ranking employer officials visited a facility because of a union organizing campaign, asked employees "how they were doing," and employees complained about lack of manpower, employer found to have solicited grievances and promised to remedy them in violation of the Act).

In sum, we find that the Respondent's conversations with Lee amounted to a solicitation of grievances. We also find that the Respondent has failed to rebut the inference that it was implicitly promising to remedy such grievances. To the contrary, Marcy told Lee that "we could work together" to address his concern. Accordingly, we agree with the judge that the Respondent's conduct violated Section 8(a)(1) of the Act.[4]

II. CONFIDENTIALITY PROVISION OF THE SEVERANCE PACKAGE

The severance package agreement devised by the Respondent to facilitate its Matteson facility work force reduction required employees to sign a settlement agreement which released and waived all claims against the Respondent. The agreement also contained a confidentiality clause providing, in pertinent part:

> You further agree that You will not . . . voluntarily appear as a witness, voluntarily provide documents or information, or otherwise assist in the prosecution of any claims . . . against the company.

Alleged discriminatees Otte and Schaff accepted the Respondent's severance package, signing the settlement agreement containing the confidentiality clause. Thereafter, when a Board agent contacted Otte during the investigation of the instant unfair labor practice charges, Otte concluded that the confidentiality provision precluded him from assisting the Board. Otte expressed fear that he would lose his severance pay and that the Respondent would sue him. Accordingly, he did not assist the Board agent.

The judge found that the Respondent violated Section 8(a)(1) by conditioning acceptance of the severance package on a requirement that employees not participate in the Board's investigative process. The Respondent has excepted to the judge's finding. We agree with the judge.

At the outset, we observe that the instant case is distinguishable from *Hughes Christensen Co.*, 317 NLRB 633 (1995), enf. denied on other grounds 101 F.3d 28 (5th Cir. 1996); and *First National Supermarkets,* 302 NLRB 727 (1991). The waiver and release agreements in those cases were limited to the claims of the employees who entered into them. By contrast, the confidentiality clause in issue here barred Otte and Schaff from assisting a Board investigation of a claim filed by another individual.

Recently, in *Metro Networks,* 336 NLRB 63 (2001), the Board held that it was unlawful for the respondent to offer an employee a severance agreement that would have prohibited him from voluntarily assisting other em-

[4] Member Truesdale agrees for the reasons stated above that the exchange between Marcy and Lee violated Sec. 8(a)(1). Because the judge's 8(a)(1) finding with respect to the Teagan-Lee discussion is cumulative, Member Truesdale finds it unnecessary to pass on the judge's finding that this discussion also violated the Act.

ployees with regard to any matter arising under the National Labor Relations Act.[5] Quoting, inter alia, *Certain-Teed Products*, 147 NLRB 1517, 1519–1520 (1964), the Board said that its "ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully to obtain relevant information and supporting statements from individuals." *Metro Networks,* 336 NLRB 63, supra at 67. In addition, the Board stated that "such investigations often rely heavily on the voluntary assistance of individuals in providing information." Id. The Board concluded that because the nonassistance provision in issue prohibited the signatory employee from voluntarily providing information to the Board concerning claims of others, the provision "unlawfully chills the Section 7 rights of all the employees." Id.

Here, as in *Metro Networks*, the clause in question prohibits the signatory employee from voluntarily providing evidence to the Board in its investigation of charges that concern other employees. Accordingly, for the reasons fully set forth in *Metro Networks*, we adopt the judge's unfair labor practice finding.

III. THE SCHEME TO REMOVE PROUNION EMPLOYEES FROM THE WORKPLACE

As stated above, Otte, Schaff, and a third employee (not named as a discriminatee in this case) accepted the severance package and left the Respondent's employ. On January 24, 2000, the Respondent permanently laid off six employees (Patrick Anthony, Michael Washington, Donald Bennett, Thomas Wentz, Antwion Lee, and Marco Castillo), allegedly on the ground that they had the most disciplinary writeups in 1999.[6] If Otte and Schaff had not accepted the severance package, they would have been laid off under the Respondent's selection criterion.

Applying *Wright Line*,[7] the judge correctly concluded that the eight named employees were discriminatorily selected for termination. The judge specifically found that the Respondent's antiunion animus motivated its choice of a layoff criterion that resulted in the termination of precisely those employees it knew formed the core of the Union's support.[8] Based on demeanor and other factors, the judge discredited the testimony of President Teagan that the layoff criterion was selected for nondiscriminatory reasons and not to target union supporters.

In affirming the judge's decision as fully supported by the record, we emphasize that Shift Foreman Jason Lamatsch, who supported the Union but successfully led the Respondent to believe he opposed it, credibly testified that Regional Manager James Evans said that he wanted no more union elections and instructed Lamatsch to start writing up specific employees. Evans instructed Lamatsch to writeup alleged discriminatees Anthony, Wentz, Washington, and Castillo. Shortly after this instruction, during weekly meetings, Evans would tell Lamatsch that he had not seen many writeups and would periodically ask if the employees were working. Operations Manager Christopher Ferraro also occasionally asked Lamatsch why there were not any writeups. Evans and Ferraro later discussed with Lamatsch eliminating the third shift. They said that they hoped this would lead the union supporters to believe that layoffs were imminent. In October 1999, shortly before Lamatsch himself was laid off, Evans told Lamatsch that a severance package was going to be offered and that Evans hoped the union adherents would sign it.

Although there is no evidence of writeups given to the alleged discriminatees following Evans' instructions to Lamatsch, the Respondent clearly indicated to a foreman it believed to be sympathetic to its cause that it intended to get rid of the union supporters through the use of layoffs and a severance package. Furthermore, the standard selected by the Respondent for determining who would be laid off operated to eliminate the precise employees that Evans indicated were being targeted. In addition, the evidence shows that the Respondent had records that tallied the number of writeups per employee, demonstrating that management officials would know which employees had the highest number of writeups and would be terminated under their chosen scheme.

Although the Respondent has no significant past practice of employee layoffs, it eliminated a foreman position just 2 months prior to the layoffs in question. Lamatsch was the foreman selected for layoff, and the credited testimony establishes that he was selected based on senior-

[5] Specifically, the nonassistance provision of the agreement provided that "you agree, not to sue or file a charge . . . in any forum or assist or otherwise participate, except as may be required by law, in any claim, arbitration, suit, action, investigation or other proceeding of any kind which relates to any matter that involves Metro . . . and that occurred on or before your execution of this Agreement."

[6] As noted above, the Respondent indicated, when it offered the severance package, that a total of nine employees would be laid off. The number of involuntary layoffs depended solely on the shortfall of employees opting for the severance package.

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Approved, *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[8] In its brief in support of exceptions, the Respondent states that it "does not challenge the ALJ's findings that Clark knew that the eight employees affected by the reduction in force (the six who were laid off and the two who resigned) were known union supporters, or that Clark harbored anti-union animus."

ity.[9] At the hearing in this case, however, the Respondent claimed, for the first time, that Lamatsch was selected based on his relative skills. The judge found, and we agree, that the Respondent shifted reasons for Lamatsch's layoff to avoid appearing inconsistent when it failed to use seniority as the method to determine the January 24 layoffs.

For these reasons, as well as those stated by the judge, we adopt his finding that the Respondent violated Section 8(a)(3) by discriminatorily selecting the union adherents for termination.

IV. ALLEGED WAIVER OF RELIEF BASED ON THE SETTLEMENT AGREEMENTS

The final issue to be addressed is whether discriminatees Otte and Schaff waived their rights to obtain relief under the Act by signing the settlement agreement which contained a clause releasing and waiving all claims against the Respondent. The judge found that the Board should not defer to the settlement agreement as a private resolution of the allegations raised in the complaint. We agree with the judge for the reasons that follow.

We must first address a procedural issue. In its exceptions, the Respondent argues, inter alia, that even if it were to concede that the selection criterion and the severance package were all part of a larger plan to remove union supporters from the workplace, the judge still erred in not giving effect to the waiver and release signed by Otte and Schaff because the General Counsel did not contest the validity of those portions of the settlement agreement.

Contrary to the Respondent's contention, the General Counsel's complaint did challenge the legality of the settlement agreement that the Respondent reached with Otte and Schaff. Specifically, paragraph VII(c) of the complaint alleges as follows:

> About February 7, 2000, Respondent entered into Severance and Settlement Agreements terminating the employment of Fred Otte and Carl Schaff, effective January 24, 2000.

In addition, paragraph IX alleges as follows:

> By the conduct described above in paragraph VII, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Furthermore, the issues raised by these complaint allegations were fully litigated at the hearing. Inasmuch as the General Counsel contended in the complaint and at the hearing that the settlement agreements were executed in violation of the Act, we find that the issue of whether they should be given any effect was properly before the judge for determination.

The validity of the waiver and release agreements such as those in this case is evaluated in the same manner as private non-Board settlement agreements. *Webco Industries*, 334 NLRB 608 (2001); *Hughes Christensen Co.*, supra. In *Independent Stave*, 287 NLRB 740, 743 (1987), the Board listed the following factors to guide the Board in determining whether to give effect to a non-Board settlement.

> (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

With respect to the first factor, although the Respondent and discriminatees Otte and Schaff agreed to the waiver and release agreement, the General Counsel vigorously opposes it. See *Frontier Foundries*, 312 NLRB 73, 74 (1993) (giving considerable weight to the General Counsel's adamant opposition to settlement).

With respect to the second factor, the instant case is distinguishable from *Hughes Christensen*, supra, in which the Board gave effect to a waiver and release agreement. In *Hughes Christensen*, the unfair labor practice charges had been dismissed at the time the discriminatees entered into the waiver and release agreement (although they were later reinstated on appeal), so at that time there was a relatively low probability that the discriminatees would prevail on their claims. By contrast, in the instant case, the unfair labor practice case was still in the investigative stage when Otte signed the settlement agreement.[10] Thus, the risk of litigation factor does not support giving effect to the waiver and release agreement

[9] The judge found that Lamatsch was lawfully laid off as the least senior foreman and not on the basis of his union activity. No exceptions were filed to that portion of the decision.

[10] The record shows that the first unfair labor practice charge was filed on January 31, 2000, and Otte signed the settlement agreement just 1 day later on February 1, 2000. The record does not show when Schaff signed the settlement agreement.

as it did in *Hughes Christensen*. See *Weldun International*, 321 NLRB 733, 734 fn. 6 (1996) (distinguishing *Hughes Christensen* on this ground), enfd. 165 F.3d 28 (6th Cir. 1998) (table); accord: *Webco Industries*, supra, 334 NLRB 608, 617.

With respect to the final two factors, there is no fraud or duress alleged or evidence of previous misconduct. The judge found, however, that the Respondent's severance package, including the waiver and release agreement, was not a bona fide offer of settlement, but was extended as part of a broader scheme to eliminate union supporters. The judge's finding must be considered as militating against the validity of the waiver and release agreement.

In these circumstances, we find that the waiver and release agreements do not satisfy the requirements of *Independent Stave* and affirm the judge's determination not to give effect to them.[11] *Webco Industries*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Clark Distribution Systems, Inc., Matteson, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee grievances and implying that those grievances would be remedied if the employees rejected the Union.

(b) Conditioning acceptance of the severance package on the requirement that employees not participate in the Board's investigative process.

(c) Discharging or otherwise discriminating against any employee for supporting International Brotherhood of Teamsters Local Union No. 710, AFL–CIO, or any other union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, rescind the unlawful portion of the release as set forth above and notify each employee who signed the release, in writing, that this has been done.

(b) Within 14 days from the date of this Order, offer Patrick Anthony, Michael Washington, Donald Bennett, Thomas Wentz, Antwion Lee, Carl Schaff, Fred Otte, and Marco Castillo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Patrick Anthony, Michael Washington, Donald Bennett, Thomas Wentz, Antwion Lee, Carl Schaff, Fred Otte, and Marco Castillo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Matteson, Illinois, copies of the attached notice marked Appendix.[12] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 6, 1999.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[11] We leave to the compliance stage of this proceeding the question of the effect that the amounts received shall have on Otte's and Schaff's backpay awards. *Webco*, supra.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit employee grievances and imply that those grievances will be remedied if the employees reject the Union.

WE WILL NOT condition acceptance of the severance packages on the requirement that employees not participate in the Board's investigative process.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Brotherhood of Teamsters Local Union No. 710, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days form the date of the Board's Order, rescind the unlawful requirement contained in the severance package that employees not participate in the Board's investigative process and WE WILL notify each employee who signed the severance package, in writing, that we have done so.

WE WILL, within 14 days from the date of the Board's Order, offer Patrick Anthony, Michael Washington, Donald Bennett, Thomas Wentz, Antwion Lee, Carl Schaff, Fred Otte, and Marco Castillo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority of any other rights or privileges previously enjoyed.

WE WILL make Patrick Anthony, Michael Washington, Donald Bennett, Thomas Wentz, Antwion Lee, Carl Schaff, Fred Otte, and Marco Castillo whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Patrick Anthony, Michael Washington, Donald Bennett, Thomas Wentz, Antwion Lee, Carl Schaff, Fred Otte, and Marco Castillo, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

CLARK DISTRIBUTION SYSTEMS, INC.

Richard Kelliher-Paz and *David Huffman-Gottschling, Esqs.,* for the General Counsel.
Ira Drogin and *Laurent S. Drogin, Esqs. (Drogin & Drogin*), of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Chicago, Illinois, on October 23–25, 2000. The charge and first amended charge in Case 13–CA–38348–1 were filed by Patrick Anthony, an individual, on January 31 and June 1, 2000, respectively. Jason Lamatsch filed the charge in Case 13–CA–38348–2 on January 31, 2000. An order consolidating cases, consolidated complaint, and notice of hearing (the complaint) issued June 16, 2000. The complaint alleges that Clark Distribution Systems, Inc. (Respondent) violated Section 8(a)(1) when it interrogated employees about their union activities, threatened employees with job loss and plant closure if they selected the International Brotherhood of Teamsters Local Union No. 710, AFL–CIO (the Union), as their representative, and solicited employee grievances and promised employees improved benefits if they did not select the Union as their representative. The complaint also alleges that Respondent violated Section 8(a)(1) by threatening employees with legal action if they assisted in proceedings against Respondent before the Board. Finally, the complaint alleges that Respondent violated Section 8(a)(3) by laying off Lamatsch on November 22, 1999,[1] laying off six employees on January 24, 2000, and terminating two more employees effective January 24, 2000.

Respondent filed a timely answer that admitted the allegations in the complaint concerning jurisdiction but denied all other allegations. Respondent also pled a number of affirmative defenses. Those defenses were: statute of limitations, laches, the Union's failure to file objections to an election that the Union had lost, failure to state a claim, waiver and release, accord and satisfaction, unclean hands, lack of subject matter jurisdiction, and setoff. Respondent, however, has not seriously pursued any of those defenses except for waiver and release. Respondent also asserted that it was entitled to relief under the Equal Access to Justice Act. At the hearing Respondent conceded that the Union is a labor organization and that the charges were properly filed and served.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

[1] All dates are in 1999 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in the distribution of printed matter at its facility in Matteson, Illinois, where it annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Illinois. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

As indicated, Respondent is engaged in the distribution of printed matter. It is a specialized "pool shipper" that provides logistics and distribution services to publishers of printed matter. Respondent receives magazines and the like that are destined for the newsstands and consolidates and ships the materials to 150 or 175 wholesale news agencies. Several years earlier Respondent shipped these products to about 400 agencies, but as a result of purchases and mergers, that number declined dramatically. This in turn caused Respondent to restructure its procedures. This is described in more detail below.

Respondent operates distribution centers in Scranton, Pennsylvania, Nashville, Tennessee, Kansas City, Kansas, and Matteson, Illinois. Warehouse workers at the Matteson facility unload trucks, prepare orders according to computer-generated documents, and then load the trucks for shipment of the newly assembled product. In 1999 employees worked on three shifts until November, when the midnight shift was eliminated. About 12–13 employees worked on both the day and afternoon shifts. Employees on the day shift work rotating shifts in that they work on weekends for 3 consecutive weeks, and then do not work weekends for the next 3 weeks.

Respondent's president, Timothy Teagan, is based in Trenton, New Jersey. Robert Marcy, Respondent's vice president of operations is stationed in Mechanicsburg, Pennsylvania. James Evans, regional manager, and Christopher Lee Ferraro, operations manager during the times relevant in this proceeding, worked at the Matteson facility.

B. Organizing Campaigns

The Union conducted an organizing campaign in 1997. Patrick Anthony, an alleged discriminatee, was responsible for initiating the union effort. A petition was filed with the Board and a hearing was conducted. Anthony testified at the hearing and also served as the Union's observer at the election. The Union lost the election. After the election a joint committee of employees and managers established certain rules that attempted to address the concerns of employees.

Beginning in late April or early May, another organizing campaign began. Anthony and Michael Washington, another alleged discriminatee, were responsible for starting this campaign. They first spoke to employees and then they visited the Union's office one evening after work and met with Bill Messina, a union representative. They told Messina that they wanted to try again to have the Union represent the employees. After discussing the matter Messina gave them union literature and authorization cards. Anthony and Washington then distributed the literature and cards to the employees in an effort to gain support for the Union. Anthony also visibly wore a union button at work every day during the campaign that followed. Around this time period Anthony told Jason Lamatsch, an alleged discriminatee, that he was thinking about trying to bring in a union again. Lamatsch asked why, and Anthony replied that it was for the same reasons that they had tried before. About 10 minutes later, Lamatsch went to the office of James Evans, Respondent's regional manager. Lamatsch told Evans that Anthony was talking about bringing in the Union again. Evans said okay. Anthony was then summoned to Evans' office where Ferraro was also present. Evans said that he had heard rumors on the dock that there was talk of the Union coming back. Evans asked if Anthony had anything to do with it. Anthony responded by asking why Evans would call him to the office and that he was not the only person with access to a telephone or who knows the telephone number to the Union. Evans said that Lamatsch said that Anthony was overheard talking to another dock employee about the Union. Anthony denied the accusation.

On May 26, the Union sent a letter advising Respondent that it was conducting an active organizing campaign and the Union then filed a representation petition.

In about June, Anthony approached Donald Bennett, another alleged discriminatee, and a few other employees at a picnic table outside Respondent's facility. Employees used the picnic table as a gathering spot during breaks and lunch. Anthony told the employees that there was going to be an effort to have the Union represent them. Bennett said that he agreed with Anthony. Later Anthony gave Bennett an authorization card in Respondent's parking lot. Bennett signed the card during lunchbreak and returned it to Anthony.

Anthony and Washington each offered authorization cards to Thomas Wentz, an alleged discriminatee. Wentz said that he would sign a card but only if his card was needed. Wentz ultimately did not sign a card.

Anthony also called Antwion Lee, also an alleged discriminatee, and solicited Lee's support for the Union. Later Anthony gave Lee an authorization card and Lee signed it. In early June, Anthony gave Lee union buttons and other paraphernalia. Lee wore the union button at work every other day. Carl Schaff and Fred Otte, both alleged discriminatees, also signed authorization cards given to them by Anthony and Washington. Otte also wore a union button while working. During the course of the election campaign Anthony and David Hohman, who was against the Union and who is also alleged to be an agent of Respondent, argued the merits of their respective positions.

In June, Ferraro, then Respondent's operations manager, asked Marco Castillo, another alleged discriminatee, what he thought about the Union. Castillo answered that he knew nothing about it and that he did not know what he was going to do. Castillo said that he wanted to know more about it and would do what was best for him and his family. Also in June, Anthony called Castillo at his home. Anthony advised Castillo that they were trying to bring in the Union and asked if Castillo

was interested. Castillo, who had only been employed by Respondent since February, said that he wanted to hear more about the matter. They agreed to talk about it again later. In fact they did so. While in Respondent's lunchroom Anthony told Castillo of the benefits the Union might provide. Castillo said that he was interested. In early July Anthony gave Castillo an authorization card for the Union and Castillo signed it and returned it to Anthony. Around that same time period Timothy Teagan, Respondent's president, visited the Matteson facility. Teagan introduced himself to Castillo and asked for Castillo's name. Teagan asked Castillo whether he was in favor of the Union. Castillo replied that he did not know what he was going to do, that he needed to know more about it. Also in July Evans approach Castillo while Castillo was on break. Evans described a nearby business where the employees had succeeded in bringing in the Union but with the result that the employees actually lost wages. Evans said that should give Castillo something to think about concerning whether he wanted the Union to represent the employees. Evans also explained the benefits that Respondent offered the employees and commented that Castillo was a good worker. He said that he hoped Castillo would stay with the company and that employees like Castillo got somewhere with Respondent.

During the campaign the Union regularly parked its van across the street from Respondent's facility. The vehicle displayed symbols clearly identifying it as the Union's and was visible from inside Respondent's facility when, as was frequently the case during the summer months, the warehouse doors were open. On occasion Anthony, Washington, Castillo, Lee, Wentz, and others would go out to the van during breaktimes and talk to the union representatives. Both Evans and Ferraro, looking through the open doors, saw the employees talking to the union representatives. Later during the day on one of the occasions that Ferraro saw the employees congregating around the van he approached Lee while they were on the dock. Ferraro said that if Lee had any questions about the Union Lee could talk to him. Lee said okay.

In early July, Ferraro and Larry Lippert, another shift foreman, approached Lee while Lee was working in what is referred to as the "supervisors office." Ferraro asked if they could talk to him. Ferraro asked if Lee knew about the petition that the Union had filed; Lee said that he did. Ferraro noted that Lee and Lippert had worked together and pointed out that Ferraro and Lippert were against the Union. Lee replied that the Union sounded kind of good to him. Lee explained that his brother was in the Union and his brother received good benefits. Ferraro said that Respondent was against the Union. Ferraro said that the only thing that would be coming out of Lee's paycheck were union dues. Ferraro then gave an example of how things would change with the Union. He explained that if Lee had a personal problem (Lee in fact had such a problem earlier) Ferraro would be unable to do anything about it because the Union would have rules. Ferraro said that Lee instead would have been disciplined for the incident stemming from his personal problem. Ferraro said that he would like Lee to go home and think about it real hard. Lee said that he had to go back to work and then he and Ferraro shook hands.

On or about July 12, Wentz received a disciplinary suspension from Ferraro. Wentz protested that he was getting the discipline because Ferraro knew that he was supporting the Union. Ferraro replied that Wentz made up excuses every time he was in trouble. Immediately after this Wentz left the facility and walked to the Union's van. He complained to the union representative that he had been disciplined because he supported the Union. Wentz remained outside by the van for about 15–20 minutes. Wentz thereafter filed a charge with the Board concerning the matter, but after an investigation he withdrew the charge.

All these employees worked together on the day shift. Washington, Lee, Bennett Castillo, Wentz, Schaff and Otte were among a group of employees who would regularly congregated with Anthony during lunchtime and breaktime to discuss the Union.

Meanwhile, on July 15, the Regional Director issued her decision. She directed that an election be conducted in a unit of full-time and regular part-time dock employees at Respondent's Matteson facility. At the hearing that preceded the Regional Director's decision Respondent took the position that four shift foremen, including Hohman and Lamatsch, were employees entitled to vote in the election. The Union claimed that the shift foremen were supervisors. The Regional Director rejected the Union's claim and concluded that the shift foremen were employees. Anthony was the only dock employee who gave testimony at the preelection hearing. Following this decision Evans told the shift foremen that they were eligible to vote in the election. They were also told to refer to themselves as working foremen.

Sometime in late July, Ferraro asked Lamatsch how things were going, whether he had all the information he needed, and which way he was going to vote. Ferraro said that he was not asking the question; rather, Lamatsch was volunteering the answer. Lamatsch did not answer. Three or 4 days later Ferraro asked Lamatsch if he was ready to vote; Lamatsch replied that he was. Ferraro said that he hopes so.[2]

In or about late July, Robert Marcy, Respondent's vice president of operations, visited the facility. During this visit Marcy approached Anthony on the work floor and they had a lengthy conversation. Marcy expressed his view that Respondent really did not need to be going through another union campaign at that time. He said that Respondent was trying to move forward and the union campaign was interfering with its ability to make progress and move in the right direction. Marcy said that he felt that Respondent had been fair to the employees and that it provided them with excellent benefits and competitive salaries. Marcy commented that after the first election a lot of the employees' concerns were rectified and that there was no reason why they could not work it out just between the employees and management.

The election was held on August 13 and again the Union lost. Anthony was the Union's observer at the election.

[2] The General Counsel does not contend that these conversations violated the Act, apparently because he concedes that they occurred outside the 10(b) period.

The facts in the preceding paragraphs are based on a composite of the credible testimony of Lamatsch, Castillo, Bennett, Wentz, Lee, Washington, and Anthony. Anthony's testimony and demeanor in particular impressed me as being both truthful and accurate. I have considered Evans' testimony. Evans did not flatly deny having a conversation with Lamatsch concerning Anthony's renewed union activities; instead Evans testified only that he did not recall such a conversation. Yet he denied that he ever told Anthony that he heard rumors about Anthony's union activity. Because the testimony of Lamatsch and Anthony concerning this incident is mutually supportive, I would be required to conclude that they likely conspired together to fabricate the evidence if I were to credit Evans' testimony. There is simply no basis for me to do so. Likewise, Evans did not deny that he had the conversation with Castillo described above; instead he again testified that he did not remember having such a conversation. I have also considered Ferraro's testimony. Ferraro did not deny the conversations with Castillo; he testified that he did not recall such a conversation. Concerning Ferraro's one on one conversation with Lamatsch, Ferraro made simple denials of the substance of that conversation, but he did not give a complete description of any conversation he may have had with Lamatsch. Ferraro, like Evans, did not deny that they had a conversation with Lamatsch concerning Anthony's renewed union activities. Ferraro denied that he knew of any employee who may have been around the union van. This testimony seems incredible, especially in light of Evans' concession that he could identify the persons standing near the van. Finally, I note that although Marcy was called as a witness by Respondent, he did not deny that he had the conversation with Anthony described above. Under these circumstances, and taking into account my assessment of the relative demeanor of the witnesses, I do not credit the testimony of Evans, Ferraro, or Marcy to the extent that it is inconsistent with the facts set forth above.

C. 8(a)(1) Allegations

The General Counsel alleges that Respondent violated the Act on several occasions as the time for the election on August 13 grew close. Two of these allegations involve the conduct of David Hohman. The General Counsel alleges, but Respondent denies, that Hohman was Respondent's agent.[3]

The General Counsel alleges that Hohman unlawfully interrogated employees. The General Counsel points to the following evidence to support that allegation. In early August, while they were in the supervisors' office Hohman asked Washington how he felt about the Union. Washington told Hohman that they needed a union and Hohman asked why. Washington answered that the employees did not have any rights or get any respect. Hohman said that if they got a union their benefits would change. Washington said that their benefits were going to change anyway and that they would probably get better benefits and more money. Hohman said that that happens on every job, but Washington disagreed.[4] It is important to note that at the hearing the General Counsel then asked Washington whether he had any other conversations with supervisors. Washington responded by describing a conversation that he had with Lamatsch, who like Hohman was a shift foreman, but who is also alleged to be a discriminatee in this case. During that conversation Washington and Anthony asked Lamatsch who was voting for the Union on Lamatsch's shift. Lamatsch answered that probably no one on shift was voting for the Union. Washington asked whether Lamatsch told the employees to vote against the Union. Lamatsch replied that he did not, that they needed a union.

The General Counsel also alleges that Hohman unlawfully threatened employees with plant closure if they selected the Union. It is unclear what evidence the General Counsel relies on to prove that allegation. Unlike the other 8(a)(1) allegations in the complaint, the General Counsel's brief does not specifically address this allegation. There is evidence, however, from Anthony concerning a conversation that he had with Hohman in early August. It should be recalled that Hohman and Anthony had previously debated the merits of having a union represent the employees. In the early August conversation, which occurred on the dock floor, Hohman asked Anthony what he exactly expected to gain by bringing in a union. Hohman went on to explain that he had researched the Union and had concluded that the information that it was providing to the employees was not accurate. Hohman said that certain companies were paying less to their employees than the Union had claimed and they lost all their benefits once the union got in. Anthony replied that he also did his homework and said that Hohman's assertions were false. They then proceeded to debate the issue. The discussion ended with Hohman saying that Anthony should do whatever he felt he had to do, but that Hohman did not think that Anthony would like the end result. Anthony replied that he would do what he had to do and Hohman should do what Hohman had to do.[5]

I now address the issue of whether Hohman was Respondent's agent. Hohman began working for Respondent in 1992. During 1999 Hohman's title was shift foreman. As described above the Regional Director determined that Hohman and the other shift foremen were employees who were included in the unit and entitled to vote in the election.

Hohman shared a desk with Wentz, an alleged discriminatee, in what has been referred to as the supervisor's office. Lamatsch, who is an alleged discriminatee, George Gayden, and Larry Lippert also each had desks in that office. All employees had access to this office.

Hohman often worked on the weekend shift when Respondent's supervisors were normally not present at the facility. Evans and Ferraro only occasionally were present at the facility during that time. Hohman told employees which trucks to load and unload. Hohman credibly testified that either Evans or Ferraro tells him what work needs to get done. He then assigns

[3] The General Counsel did not allege in the complaint that Hohman was a supervisor. However, midway through the hearing the General Counsel did make a motion to amend the complaint to make that allegation. I denied that motion and the Board denied the General Counsel's special appeal of my ruling.

[4] These facts are based on Washington's credible testimony.

[5] These facts are based on Anthony's credible testimony. Hohman denied that he had such a conversation with Anthony, but his explanation as why he did not was particularly unpersuasive.

employees to perform that work. Castillo testified that Hohman assigned work by handing out the paperwork to the employees. When the employee finished that assignment, he returned the paperwork to Hohman and received the next assignment. As Castillo explained, Hohman would frequently permit the employees to select their own assignments. As Lamatsch described the process: "The truck came in and [Hohman] had someone free, whoever was free got that truck." Wentz described the assignment process as follows: "Every time I'd finish a truck, I would ask [Hohman] . . . I'm done with this truck. Do you want me to get that one now?" Washington, another witness called by the General Counsel, explained that when Hohman was late or otherwise not available during the weekend shifts another employee assigned the work. On occasion Hohman would tell employees to stop working on one assignment and begin another. Hohman credibly testified that this sometimes stemmed from instructions that Evans or Ferraro had given to him to reassign the employee, but on other occasions he made that decision on his own if he felt that a higher priority project was not being done in a timely fashion. Hohman admitted that his responsibilities include making sure that the employees are working.

The General Counsel also relies on Hohman's role in conducting discussions with employees concerning attendance problems. Respondent uses an employee discussion report to formalize discussions with employees. The report gives the reason for the discussion, an explanation of the incident leading to the discussion, and gives instructions and further action concerning the matter. The employee signs and dates the form. The "supervisor" who conducted the discussion also signs the form. On at least one occasion Hohman signed the form as the supervisor who conducted the discussion. That form indicated that the employee was receiving a verbal warning for excessive tardiness. It listed the dates that the employee was late and reminded the employee that he was expected to be at work on time. It warned that further discipline would result if the problem continued. Ferraro completed the form; Hohman merely presented the form to the employee, answered any questions that the employee might have, and then signed the form. The uncontradicted evidence shows that attendance problems are brought to Ferraro's attention pursuant to a report that is generated based on an examination of timecards. Ferraro determines whether action should be taken and then passes on written instructions to shift foremen.

The General Counsel points to Hohman's role in discipline. Castillo testified that he received disciplinary writeups while he worked for Respondent, but none of them were from Hohman. Lee testified that on one occasion Hohman told him to stay busy; Lee retorted that he was working. Lee, however, did not receive a written discipline concerning this incident. The General Counsel also points to an incident that occurred in May between Hohman and Washington. Washington was standing and waiting for certain equipment that he needed to move pallets. Hohman, his voice raised, asked Washington what he was doing. Washington, also raising his voice, replied that he was waiting for some a forklift so that he could do his job. Hohman said that Washington should use a pallet lift rather than wait around for the forklift. Washington, however, insisted that he needed a forklift. Hohman told Washington to go to the office. Washington refused and said that Hohman should go to the office. Hohman then left and returned and asked Washington to *please* come in to the office. Washington agreed to do so. Once inside the office Hohman presented Washington with a two-page writeup. Hohman said that Washington should read the writeup and sign it, but Washington refused.[6] Hohman then brought the matter to Ferraro's attention. Ferraro in turn discussed the incident with Washington. On May 26 Ferraro presented Washington with an employee discussion report form. Ferraro signed that document as the supervisor conducting the discussion; Hohman did not sign the document. The report indicated that Washington was receiving a verbal warning for conflict with supervisor. The report explained that Hohman gave Washington instructions on how to work his assignment but Washington did not like the way in which he was approached/talked to and responded verbally causing a conflict on the dock floor. Ferraro wrote:

> [Washington] is expected to take direction from all supervision and management. If [Washington] has any problems unrelated to the directions he's given, he must take those issues up with the proper higher management in the proper way. I will not allow confrontations on the dock floor. After the incident occurred, I had a discussion with [Washington]. I have looked into and taken appropriate action on his complaints.

Ferraro explained to Washington that Hohman was his supervisor and he had to take directions from Hohman.

The General Counsel also relies on Hohman's participation in the employee appraisal process. Respondent uses written performance appraisal forms. The appraisal evaluates an employee's performance in categories such as knowledge, quality, dependability, judgement, productivity, initiative, versatility, and personal characteristics. Before 1999 Hohman's name appears as a supervisor and he actually assigned a numerical score to each of the evaluated categories. Hohman based the numerical score he gave an employee on his observation of their performance. However, the employee first also assigned himself a numerical score in the same categories. Before Hohman's scoring was shown to the employee Hohman first showed it to Ferraro or Evans for approval. If Ferraro or Evans disagreed with Hohman's scoring, changes were made to the appraisal at that time. The employee also made comments about his performance on the appraisal form and Hohman also made comments about the employee's performance. Ferraro's name appears as the person who evaluated the employee and Evans' name appears as the person who reviewed the appraisal. On the payroll authorization forms used for wage increases, Evans of Ferraro are identified as the employee's supervisor and there is no indication that Hohman played any role in determining the amount of any salary increase. Beginning sometime in 1999, however, Ferraro's name, instead of Hohman's, appeared as the supervisor who assigned the numerical scores

[6] I have considered Hohman's testimony concerning this incident. His memory of it was not very clear. I conclude Washington's testimony is more credible.

and made written comments about the employee's performance.

Analysis

The Board recently summarized the standard to be applied determining agency as follows:

> Under common law principles of agency, which the Board applies when examining whether an employee is an agent of the employer in the course of making a particular statement or taking a particular action, the Board may find agency based on either actual or apparent authority to act for the employer. "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal had authorized the alleged agent to perform the acts in question." *Southern Bag Corp.,* 315 NLRB 725 (1994), and cases there cited. See also *Alliance Rubber Co.,* 286 NLRB 645, 646 (1987). The test is whether, under all the circumstances, employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World,* 286 NLRB 425, 426–427 (1987). Under Board precedent, an employer may have an employee's statements attributed to it if the employee is "held out as a conduit for transmitting information [from management] to other employees. *Debber Electric,* 313 NLRB 1094, 1095 fn. 6 (1994).

Huasner Hard-Chrome, 326 NLRB 426, 428 (1998).

It is true that Hohman acts as conduit for management in making assignments and that Respondent expects employees to follow Hohman's instructions in that regard. For the most part, however, those assignments were routine in nature and hardly of the type and character to show that Hohman was a spokesman for management beyond those routine instructions.

Whatever limited role Hohman played in the appraisal process ended sometime in 1999 before the alleged unlawful statements were made. Hohman's role in transmitting the discussion forms to employees is perfunctory and does not constitute weighty evidence that employees would perceive him to be acting for management concerning his statements about the Union.

The General Counsel argues that Hohman's unlawful statements mirrored Respondent's unlawful statements, and thus, support the finding of agency status. I conclude just the opposite. Hohman's conversation with Washington was nothing more than a discussion between employees about how they were going to vote. It should be remembered that Hohman was found to be an eligible voter who possessed every right to engage in such discussions. This finding was based on essentially the same evidence that the General Counsel now relies on to prove Hohman's agency status. Indeed, any attempt by Respondent to restrict the shift foremen in discussions about the Union with fellow employees under these circumstances could itself have violated the Act. My finding in this regard is buttressed by Washington's testimony that he raised the subject of the Union with another shift foreman, Lamatsch. Anthony's conversation with Hohman was in the same vein. It was merely one of several that they had about the Union as employees.

I have considered the cases cited by the General Counsel in his brief. But each case turns on all of the circumstances. Under all these circumstances, I conclude that the General Counsel did not meet his burden of showing that Hohman was an agent of Respondent. I shall therefore dismiss the allegations of the complaint concerning Hohman's alleged unlawful statements.[7]

Next, the complaint alleges that about the first week of August Ferraro unlawfully interrogated an employee. The resolution of this allegation requires an analysis of whether the alleged unlawful conduct occurred within the 6-month period set forth in Section 10(b). The complaint alleges, and Respondent admits, that the first charge in this case was served on Respondent on February 3, 2000.[8] The 10(b) period therefore begins to run after August 2. *Baltimore Transfer Co.,* 94 NLRB 1680, 1682 (1951). Thus, the complaint allegation itself does not clearly indicate that the conduct occurred within that period.

The facts in support of this allegation show that sometime in late July Ferraro offered employees t-shirts displaying the name "Local 710" in a circle with a line drawn through the circle. Castillo accepted the t-shirt but did not wear it. Later that day Ferraro asked Castillo why he was not wearing the t-shirt. Castillo answered that the t-shirt was too nice to get dirty. Ferraro said that Castillo should not worry about getting it dirty, that there were more available. Castillo then put on the t-shirt. That same day Washington gave Castillo a union pin and Castillo wore the pin on his t-shirt. Ferraro then asked Castillo why he was wearing the pin and who was he voting for; Castillo answered, not surprisingly, it makes you wonder. Ferraro laughed and walked away. After that Castillo did not wear the pin or t-shirt again. A few days later Ferraro asked Castillo why he was not wearing the t-shirt. The record does not reflect where this conversation took place or Castillo's response, if any. In any event, Castillo later accepted two more t-shirts from Ferraro. Around this same time, during the shift change time at 4 p.m., Evans announced that that he had the t-shirts and that any employee who wanted one could come by and get it.

Analysis

The issue of whether allegedly unlawful conduct occurred within the 10(b) period is an affirmative defense that must be raised by a Respondent. Here, that issue has been raised in a timely fashion. Under these circumstances I conclude it is incumbent that the General Counsel establish, by a preponderance of the evidence that the conduct occurred within that period. A finding that the conduct occurred "[a]bout the first

[7] Pars. 5 (a) and (f) of the complaint. I find therefore find it unnecessary to decide whether that alleged conduct occurred within the 10(b) period, whether Hohman's isolated questioning of Washington, an open union adherent, was coercive, and whether Hohman said anything during his conversation with Anthony that could be construed as a threat of plant closure.

[8] In his brief the General Counsel argues for the first time that the charge was actually served on Respondent on February 2 instead of February 3. This contention comes too late. The complaint's allegation and the answer's response constitute an admission binding on both parties.

week in August" as alleged in the complaint, is insufficient to conclude that a violation of the Act has occurred. Here Castillo testified that this incident occurred "Sometime in July. That's all that I can remember." This is clearly outside the 10(b) period. Castillo testified that a couple of days later Ferraro again asked him why he was not wearing the antiunion t-shirt. This still falls short of supporting a conclusion, based on the preponderance of the evidence that the act occurred within the 10(b) period.

In his brief the General Counsel argues that I should not rely on Castillo's testimony in determining when this conversation took place, but instead I should rely on Ferraro's testimony that he must have purchased the t-shirts in the first or second week of August. Evans, however, testified that the t-shirts were distributed probably 3 or 4 weeks prior to the election. Other testimony is similarly divided. Anthony testified that the t-shirts were distributed in July while Washington claimed that this occurred about a week before the election. I find no basis for disregarding Castillo's own testimony concerning when these events occurred.

I am unable to conclude that the preponderance of evidence shows that these events occurred within the 10(b) period. Accordingly, I shall dismiss that allegation of the complaint.

A similar issue arises from the next allegation. The complaint alleges that about the first week of August 1999, Evans unlawfully threatened employees with job loss and other unspecified reprisals. In support of this allegation the General Counsel relies on Wentz testimony. Wentz credibly testified that about 2 weeks before the August 13 election Evans pulled him aside and said the union vote was coming up in a couple weeks and it was going to be the employees' choice of whether or not to bring in the Union. Evans said that if they brought in the Union Respondent was going to have to negotiate insurance and the insurance could change. Evans said that it might not be a great concern for Wentz, but for employees with families they could lose their insurance if it goes up for negotiation. Evans also said that their paid days off could go up for negotiation. Evans commented that Anderson News owns a large portion of Respondent and Anderson News is not unionized. Evans asked what Wentz thought they are going to do if they have one of their facilities go union. Evans answered the question he had asked by saying: "They're not going to let it happen." Evans said that it was Wentz' choice, that he hoped that Wentz made the right choice. Wentz asked what was so bad about the Union. Evans answered that everything that Respondent did would have to go through the Union and negotiate.[9]

[9] Evans admitted that he had a conversation with Wentz about the union, but he placed the conversation about a month or more before the election. He testified that he explained to Wentz that benefits would be subject to negotiation if the Union won the election and that Respondent would no longer be able to deal with employees on an individual basis. Evans claimed that Wentz made no response. He denied that he ever told Wentz that Anderson News would not allow a union in at Respondent's Matteson facility. As demonstrated above, I have not regarded Evans as a reliable witness. I conclude that Wentz' testimony here is more credible.

Analysis

I conclude that this incident occurred on or about July 31 and therefore outside the 10(b) period beginning August 3. I shall dismiss this allegation of the complaint.

The next two allegations in the complaint allege that Respondent unlawfully solicited employee complaints and grievances and promised improved terms and conditions of employment if the employees did not select the Union. These allegations will be resolved together.

Sometime during the week before the August 13 election, Robert Marcy, Respondent's vice president of operations, and Timothy Teagan, Respondent's president, visited the Matteson facility and spoke to a number of the employees. Marcy approached Lee while he was working on the dock. Marcy introduced himself to Lee and they shook hands. Marcy commented that Lee was a new face and asked Lee what was going on around there.[10] Lee told Marcy that he felt that the problem was that Respondent changed the rules back and forth. Marcy explained that the more senior employees made the rules and Lee answered that he did not know that. Marcy then said that they could work together so that the rules could be suitable for everyone. After Lee said okay, the two men exchanged pleasantries and Marcy left.

That same day Teagan also approached Lee. The two men introduced themselves to each other. Like Marcy, Teagan asked Lee what was going on around there. Lee again complained about Respondent changing the rules. Lee also spoke about the need for better pay. Teagan said that it was the employees who made the rules and Lee again replied that he did not know that. Lee complained about how Hohman had treated employees unfairly and Lee gave an example. Teagan commended Lee on how hard he was working. Lee said that it was not personal against the company but he was going to do what he thought was right for the family. Teagan affirmed that it should not be something taken personally.[11]

Analysis

An employer violates Section 8(a)(1) when it solicits employees' grievances and either directly or impliedly promises to remedy those grievances if the employees do not select a union to represent them. *Hospital Shared Services,* 330 NLRB. 317 (1999), and cases cited therein.

Respondent argues that because the Union was not mentioned in either conversation, the General Counsel has failed to

[10] In his brief the General Counsel contends that Marcy approached Lee and asked him what the problem was around there. The record does not support the contention that Marcy explicitly asked Lee that particular question.

[11] The facts in the two preceding paragraphs are based on Lee's credible testimony. Although called as a witness by Respondent, Marcy did not refute Lee's testimony. Teagan admitted that he visited the Matteson facility on two or three occasions during the organizing campaign and on one of those occasions he discussed the campaign with Lee. Teagan, however, was unable to recall the substance of his conversation with Lee. Respondent argues that because its supervisors and managers were provided professional training concerning how they were to comport themselves in accordance with the law, it is unlikely that they would have ignored that training. However, the facts set forth above belie that argument.

show that the conversations were related to the Union campaign. I disagree. The evidence shows that Marcy and Teagan visited the Matteson facility, at least in part, because of the organizing campaign. The individual conversations they had with employees were part Respondent's response to the organizing effort, and employees certainly understood that. Marcy and Teagan did not have to explicitly state what was implicitly understood—that they were talking to the employees because of the union campaign. Respondent also argues that the conversations did not amount to solicitations of grievances. Again I disagree. Both Teagan and Marcy asked Lee what was going on. Lee understood that as an invitation to voice his grievances, and Marcy and Teagan gave no indication that Lee had misunderstood their queries. Instead, they both listened as Lee described his concerns. Finally, Respondent argues that the conversations did not contain an implied promise that the grievances would be remedied if the Union lost the election. Turning first to Marcy's conversation, Marcy explained to Lee that the employees determined the rules. This was in obvious reference to the joint committee, described above, that was formed after the first election and addressed the employees' concerns. Then Marcy specifically told Lee that they could work together and address Lee's concern. This was an implied promise that Lee's concerns would be addressed if the Union lost. Teagan, like Marcy reminded, informed Lee that the employees made the rules. In context these statements were implied promises that, as occurred after the last election, if the Union lost Respondent would address the concerns of the employees.

By soliciting employee grievances and implying that those grievances would be remedied if the employees rejected the Union, Respondent violated Section 8(a)(1).

D. Lamatsch's Termination

As indicated, the General Counsel alleges that Respondent unlawfully terminated Jason Lamatsch. Lamatsch began working for Respondent in 1992. He started working as a dockworker and later became a shift foreman. During 1999 Lamatsch worked on the afternoon shift.

During the 1997 organizing campaign described above, Evans asked Lamatsch to keep an eye on the employees to be sure that no organizing activities occurred when the employees should be working.[12] Lamatsch agreed. He made sure that the employees kept working. He also tried to find out which employees were supporting the Union and which were not. He did this by listening to the employees' conversations. Every few days throughout the campaign Lamatsch reported this information to Evans.

As previously described, in late April or early May, Anthony told Lamatsch that he was thinking about trying to bring in a union again. Shortly thereafter Lamatsch went to Evans' office and told Evans that Anthony was talking about bringing in the union again.

Later, Evans told Lamatsch that the petition had been filed and that they were going to have another union campaign; he also told Lamatsch to keep an eye on the employees so that they continued to work. Evans specifically mentioned employees Patrick Anthony, Thomas Wentz, and Michael Washington. These employees worked on the day shift while Lamatsch worked the afternoon shift. Lamatsch thus had occasion to work with these employees only during overtime periods. Evans also told Lamatsch to stay focused in the right direction because, as part of management, Lamatsch could not support the Union. Evans said that if Lamatsch supported the Union he would be terminated. As indicated above, following the Regional Director's decision Evans told the shift foremen that they were eligible to vote in the election. They were also told to refer to themselves as working foremen. At that time Evans told Lamatsch that he could no longer talk to Lamatsch the way he had in the past.

In or about July, Lamatsch, who had not been in favor of the Union, changed his mind. As previously described Lamatsch told Anthony and Washington that he felt the employees needed a union. However, Lamatsch never directly informed Respondent of his change of heart. To the contrary, Lamatsch admitted that he continued to tell Respondent that he was still against the Union. Lamatsch wore an antiunion t-shirt at work and also wore it on the day of the election. On August 26 Lamatsch signed and completed his annual appraisal. In that appraisal Lamatsch listed some of what he regarded were strong points in his performance. Among them was I also was very vocal with employees during the union elections trying to get votes for the company.

In September, after the election Evans told Lamatsch that Respondent had won the election and wanted no more elections. Evans said that they needed to start writing up the employees. Evans specifically named Anthony, Wentz, Washington, and Castillo and said that they were union votes. Thereafter about once a week Evans raised that subject during the meetings with the foremen in Evans' office. Evans asked whether the employees were working; he said that he had not seen many writeups. During this same time period, Ferraro made similar remarks. In October, Ferraro remarked that some of these employees had to be doing something wrong; he asked Lamatsch why there weren't any write-ups. Lamatsch replied that everyone was working. Apparently the foremen did not follow Evans suggestions in this regard.[13] In October, Evans and Ferraro discussed the elimination of the midnight shift with Lamatsch. They said that maybe getting rid of the midnight crew would start to show that the workload was dropping and that maybe the union employees would start to realize that they were going to be gone. Also in October, Evans mentioned that Respondent was thinking of offering a severance package for the employees with the hope that the union supporters would take the severance package and leave.[14]

In November Respondent decided to transfer some work from the Matteson facility to its Kansas City location. As a

[12] Lamatsch gave several versions of what Evans' instructions were. I am not persuaded that these instructions were to do anything more than indicated above. Evans' testimony on this point is not to the contrary.

[13] There is no allegation that Respondent in fact meted out more discipline to the Union supporters.

[14] These facts are based on Lamatsch's credible testimony.

result Respondent no longer needed to maintain 24-hour operation at the Matteson facility. Respondent thus eliminated the midnight shift, one of its three shifts. This shift used the least number of employees and was staffed to some degree with temporary workers.[15] Most of the employees working on the midnight shift were temporary employees who were released. The remaining employees on that shift were transferred to the two remaining shifts.

On November 22, Evans summoned Lamatsch into Evans' office and told him that due to downsizing and because he had the least seniority among the supervisors he was released. Lamatsch asked whether he could be demoted to a rank-and-file position. Evans said that Respondent did not demote management. The next day Lamatsch called Marcy. Lamatsch asked why he was let go. Marcy explained that Respondent was going through some changes and that they had to make some changes and it was unfortunate that he was the one to be let go. Marcy explained that it was not a matter of performance; that Respondent simply needed to let some one go. In fact, Lamatsch had the lowest seniority among the foreman.[16] Since Lamatsch's termination Respondent has operated with only two shift foremen.

Analysis

The shifting burden analysis set forth in *Wright Line*[17] governs the determination of whether Respondent violated Section 8(a)(3) and (1) of the Act by terminating Lamatsch. The Board has restated that analysis as follows:

> Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9]

T & J Trucking Co., 316 NLRB 771 (1995).

This was further clarified in *Manno Electric*, 321 NLRB 278 (1996).

The application of this standard begins with an examination of whether Lamatsch engaged in union activity. The only evidence of this is Lamatsch's statement to Anthony and Washington that he felt the employees needed a union. There is no direct evidence that Respondent was aware of this singular act of union activity. This must be weighed against the visible manner in which Lamatsch displayed an antiunion sentiment. He loyally informed Respondent of Anthony's renewed union activity, wore an antiunion t-shirt at work and on election day, and commended himself to management for his antiunion activities in his appraisal.

Of course, knowledge of union activities needed not be established only by direct evidence; it may also be inferred from all the circumstances. In this regard the General Counsel argues because Lamatsch refused to issue more disciplinary warnings to the union adherents Respondent must have suspected that Lamatsch had become a union supporter. I decline to make such an inference. So far as this record shows, Lamatsch's conduct in that regard is indistinguishable from the other shift foremen who were also admonished to begin issuing more writeups. Indeed, as Respondent argues in its brief, it would make little sense for Evans and Ferraro to continuously direct Lamatsch to identify work rule violations for the union adherents if Respondent believed that Lamatsch himself was a union adherent. It is important to recall that the General Counsel does not allege that Lamatsch was terminated as a result of a refusal by him to commit an unfair labor practice; rather the allegation is that Lamatsch was terminated because he engaged in union activity.

The General Counsel argues that I should infer an unlawful motive for Lamatsch's discharge from the shifting reasons given for that discharge. It is true that Lamatsch was told that he was selected for termination because of reasons of seniority yet at trial Respondent gave other reasons for Lamatsch's selection. However, I do not infer from this that Respondent was seeking to hide another, perhaps unlawful, reason for Lamatsch's termination. Rather, I conclude that Respondent shifted reasons to avoid appearing inconsistent when it later failed to use seniority as a standard to select other employees for the lay off that is described below.

Under these circumstances I conclude that the General Counsel has failed to meet his initial burden under *Wright Line.* I dismiss this allegation of the complaint.

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[15] The General Counsel does not allege that the transfer of work to Kansas City or the elimination of the third shift was unlawful.

[16] The facts in the foregoing paragraphs are based on Lamatsch's testimony. I have considered Evans' contrary testimony. As indicated above, I have not found Evans' testimony to be particularly persuasive and I do not credit him on this occasion. Teagan testified that he made the decision to terminate Lamatsch. He explained that with the elimination of the third shift he had one extra shift foreman. He felt that while Lamatsch performed his duties capably, the other foremen, Hohman and George Gayden, were more capable. He testified that he did not consider, and was not aware of, the relative seniority of the foremen at the time he decided to terminate Lamatsch. I find this testimony thoroughly unconvincing and do not credit it. Rather, I conclude that this testimony is nothing more than a recent fabrication.

[17] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[7] NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983).

[8] See *GSX Corp. v. NLRB*, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("By asserting a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the Illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")

[9] See *Aero Metal Forms*, 310 NLRB 397, 399 fn. 14 (1993).

E. Severance Agreement and Termination of Otte and Schaff

As a continuing consequence of its decision to transfer work from Matteson to Kansas City, Respondent determined that a further reduction in force was necessary. In December or January 2000, Teagan decided to reduce the Matteson work force by nine employees. Respondent decided to attempt to first obtain employees to volunteer for lay off. It devised the severance package described below. If nine employees elected to take that package there would have been no need to select any employee for lay off. As described above, in October, Evans told Lamatsch that Respondent was thinking of putting out a severance package for the employees with the hope that the union supporters would take the severance package.

In January 2000, Respondent distributed a written notice to employees. The notice informed the employees that Respondent would be reducing its full-time warehouse and clerical staff on January 24, 2000, due to a reduction of volume moving through the facility. Respondent also announced that it was offering a voluntary severance package to all employees except shift foremen and working foremen. The package, in general, consisted of 40 hours pay for each year worked for Respondent. However, to participate in the severance package Respondent required that the employees resign their positions by close of business January 24 and sign a release. The offer was made on a first come, first serve basis in the event that more than the needed number of employees accepted it. In the event that an insufficient number of employees accepted the severance package, a mandatory layoff would occur on January 24, 2000. However, the employees who were involuntarily laid off would not receive the severance pay. The notice advised that the selection of employees for lay off would be based upon your adherence to work rules (as evidenced by your number of writeups) during 1999.

As indicated, in order to obtain the severance pay the employees had to sign a release. That release, entitled Severance and Settlement Agreement, Release and Waiver of All Claims" consisted of five typewritten pages and included the following:

> *Confidentiality:* You hereby agree to keep confidential the terms of this agreement. You specifically agree that You will not communicate or publish the terms of this agreement to anyone except Your spouse, children, legal and financial representatives, tax preparer, or others as may be required by law; however, before such information is disclosed by You to any such representatives, You shall advise such persons that the terms of the Agreement are confidential and that their disclosure of the terms of the Agreement will subject you to suit by the Company. You may not impart the terms of this Agreement to any of the previously identified persons unless they agree to abide by this confidentiality provision. You further agree that You will not counsel, voluntarily appear as a witness, voluntarily provide documents or information, or otherwise assist in the prosecution of any claims, class action or otherwise against the Company or Releasees. You further agree that You will not make or cause to be made or published any statement, written or oral, directly or indirectly, which in any way disparages the Company, its employees, agents, or representatives.

Otte signed the release on January 21, 2000, and received $4,707.10 in severance pay. Schaff also signed the release, as did a third employee not named as a discriminatee in this case. On January 31, 2000, Anthony filed a charge concerning the alleged unlawful layoff of employees on January 24, 2000; Otte and Schaff were named in the charge. An investigating agent of the Board contacted Otte and requested Otte to give an affidavit concerning the matters under investigation. Otte agreed to do so. Otte did not know that he was named in the charge. However, later Otte reviewed the confidentiality provision of the release in the severance package and concluded that it prevented him from cooperating with the Board's investigation. He called the Board agent and informed the agent of the existence of the confidentiality agreement and expressed his fear that if he cooperated he would forfeit his severance pay and Respondent could sue him. Otte explained that he was raising a family and it would be devastating to him and his family if that happened. He canceled the meeting that had been set with the Board agent.

On February 25, 2000, Respondent submitted a statement of position to the Board concerning the investigation of the charge that had been filed. That letter stated:

> It should be noted that by joining in this unfair labor practice charge, Messrs. Otte and Schaff, who have both signed releases as part of their acceptance of the severance package, are in violation of the terms of the Separation Agreement. We decline to provide you with copies of these Separation Agreements as they contain confidentiality provisions. The Company reserves all rights to recoup any severance monies paid and to enforce all other rights it possesses in the event that Messrs. Otte and Schaff do not withdraw their names from the Charge in which they have been named—perhaps unknowingly—by Mr. Anthony.

Analysis

The General Counsel alleges that the terms of the severance agreement violated Section 8(a)(1). On the one hand, under appropriate circumstances employees may voluntarily waive their right to file charges with the Board when they execute waiver and release agreements when, as here, it is done in exchange for enhanced severance payments. *Hughes Christensen Co.,* 317 NLRB 633 (1995). See also *First National Supermarket,* 302 NLRB 727, 727–728 (1991). On the other hand, employees have a right to cooperate in the Board's investigative process. In *Harding Glass Co.,* 316 NRLB 985 (1995), the Board affirmed the judge's conclusion that the employer there violated the Act by telling employees that they should not cooperate with a Board investigation. The judge there described the law as follows:

> By advising an employee that he or she need not honor a Board subpoena, an employer violates Section 8(a)(1) because such conduct tends to impede the Board in the exercise of its power to compel the attendance of witnesses in its proceedings and tends, further, to deprive employees of the vindication of their rights through the participation

> of witnesses in a Board proceeding. *Bobs Motors,* 241 NLRB 1236 (1979). See also *Windsor Castle Health Care Facilities,* 310 NLRB 579, 592 (1993). The Act's protections, moreover, extend beyond its formal proceedings and exist independent of the issuance of a subpoena. Employees have the right to assist the Board in its investigation of unfair labor practice charges; they have the right to have the Board conduct complete investigations of their charges without interference by the employer. The Board's channels of information must be maintained free from employer intimidation of perspective complainants and witnesses. *NLRB v. AA Electric Co.,* 405 U.S. 117, 121, 123, (1972), quoting from *John Hancock Mutual Life Ins. Co. v. NLRB,* 89 U.S. App. D.C. 261, 263, 191 F.2d 483, 485 (1951). See also *Art Steel California, Inc.,* 256 NLRB 816, 821–822.

Id. at 991.

A provision of the severance agreement, set forth more fully above for context, stated:

> You further agree that You will not . . . voluntarily appear as a witness, voluntarily provide documents or information, or otherwise assist in the prosecution of any claims . . . against the Company.

This language means that the employees who signed the release could not, among other things, voluntarily provide evidence to the Board in the investigation of charges that concerned other employees. Put somewhat differently, Respondent thus conditioned acceptance of its severance package on the employee's agreement not to cooperate with the Board's investigation of charges that concern employees other than the employee who signed the release. This is an overbroad restriction of the rights of employees set forth above.

Respondent argues in its brief that there is no evidence that Otte had any relevant evidence to present to the Board during the investigation of the charge and thus there is no evidence that the severance agreement actually caused information to be withheld from the Board. This argument misses the point. The test is not whether conduct actually causes coercion but whether such conduct reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

I conclude that Respondent violated Section 8(a)(1) by conditioning acceptance of the severance package on the requirement that employees not participate in the Board's investigative process. I shall deal with the terminations of Otte and Schaff in the next section of this decision.

F. Layoff of Six Employees

As indicated, Otte, Schaff, and one other employee accepted the severance package and left Respondent's employ. Castillo, Bennett, Wentz, Lee, Washington, and Anthony declined to accept the severance package. On January 24, 2000, Respondent permanently laid off these employees. About 12–14 employees remained employed by Respondent after the lay off.

Respondent contends that these employees were selected based on the number of disciplinary writeups they received in 1999. Teagan testified that he made that decision. Teagan explained that he considered but rejected using seniority as a basis for selecting employees for layoff. He felt that seniority was not a good way to select persons for lay off. In this regard Respondent maintains a progressive disciplinary policy. The first step in disciplinary system calls for a verbal warning that is memorialized in writing. The steps continue with a written warning, a 2-day suspension, a 5-day suspension, and termination. These steps are applied to over a rolling 9-month period. A committee of management personnel and employees created this system after the 1997 election.

The record reveals that Wentz received two disciplinary notices in February and a third in July; Washington received two in may and a third in November; Lee received one in February, two in March, and a fourth in April; Castillo received two in July and a third in January 2000; Bennett received one in January, and a second and third in November; Anthony received one in February, one in April, a third in October, and a fourth in December. The remaining employees received two or less disciplinary notices during this time period. It is apparent from the records that Respondent would have known that the alleged discriminatees would be laid off if the number of disciplinary writeups was used as the standard. As Respondent points out in its brief, the alleged discriminatees received a total of 21 disciplinary writeups from January 1 through August 13.[18]

Analysis

I again apply the *Wright Line* analysis to determine whether these employees were unlawfully terminated. As I have described above in detail, each of the eight alleged discriminatees engaged in union activity. Anthony was the most visible union adherent; he, with Washington, led the organizing effort. Lee, Otte, and Castillo each signed authorization cards and wore union buttons. Bennett and Schaff also signed cards. Wentz promised to sign a card if it was needed and visibly visited the Union van after he received a suspension. Anthony, Washington, Castillo, and Lee also visibly visited the union van.

Respondent was aware of the fact that these employees supported the Union. As described above, many of these employees wore union buttons and visited the union van. Importantly, all of these employees worked on the same shift and congregated together during lunch and breaktimes to discuss the Union. The totality of the record amply supports the finding that Respondent knew or suspected that these eight employees formed the core of the union support.

The record shows that Respondent harbored animus toward the union activity of the employees. I have set forth above how Respondent, through both Marcy and Teagan, violated Section 8(a)(1) by soliciting grievances. Although I have rejected the General Counsel's assertions that other conduct violated the Act, I did so on the basis that the conduct occurred outside the 10(b) period. However, it is well settled that conduct that occurred outside the 6-month period set forth in Section 10(b) may be considered to the extent that it sheds light on the conduct that occurred within that period. *Machinists Local 1424 v. NLRB,* 362 U.S. 411, 416–17; *Grimmway Farms,* 314 NRLB

[18] I specifically do not credit Teagan's testimony that he did not know which employees would be laid off as a result of the disciplinary writeup layoff standard.

73, 74 (1994). I proceed to examine that evidence to determine whether it sheds light on the motive for conduct that occurred within the 10(b) period. As described above, Ferraro, Teagan, and Evans each questioned Castillo about his union sentiments. Also, sometime in late July, Castillo accepted an antiunion t-shirt. On three occasions that day Ferraro asked him why he was not wearing the t-shirt or whom he was voting for. Although any one of these interrogations, viewed in isolation, might be insufficient to show a hostility toward union activities, when viewed under all the circumstances, especially considering the repetitive nature of the questioning, I conclude the questioning was coercive in nature and displayed a hostility toward union activity. Also some time in late July, Evans told Wentz that Anderson News owned a big portion of Respondent and that Anderson News would not permit the Matteson facility to go union. This statement indicated that unspecified reprisals might be taken against employees to prevent the unionization of the Matteson facility. This too indicates an unlawful hostility towards the union activities of the employees. Other instances of unlawful hostility are apparent. Evans coercively interrogated Anthony when he summoned Anthony to his office and pressed him about his renewed union involvement. I note that Anthony was not open about his union activities at that time and felt compelled to hide his union activities from Evans. Ferraro's interrogation of Lamatsch was also coercive, especially due to his comment that he was not really asking any question, that Lamatsch was volunteering the answer. This evidence amply shows that Respondent harbored animus toward the union activity that the employees had engaged in.

Other statements made by Respondent shed light on later events. Marcy expressed his exasperation to Anthony at having to go through another union campaign. He told Anthony that after the election Respondent would again attempt to rectify the employees' concerns. After the election Evans told Lamatsch that Respondent did not want to have any more election campaigns and that Lamatsch should look for reasons to issue disciplinary writeups to the union supporters. Later Evans and Ferraro told Lamatsch of the elimination of the third shift and expressed their hope that the union supporters would interpret that move as a sign that they would be gone too. Evans still later told Lamatsch that Respondent was assembling a severance package with the goal in mind that the union supporters would take the package and leave. This evidence lends further support to the General Counsel's claim that the employees were terminated because of their union activity.

Respondent argues that the alleged discriminatees had engaged in union activities for many years without any reprisals from Respondent. That certainly is the case, but I conclude from the facts above that Respondent had grown intolerant of union activity. Under these circumstances I conclude that the General Counsel has met his initial burden.

I turn now to examine whether Respondent has established that it would have terminated these employees even in the absence of union activity. Respondent asserts that these employees would have been terminated in any event because they had the most disciplinary writeups in 1999. To be sure, these employees did have the greatest number of writeups. But this fact does not resolve the matter. The question remains: why did Respondent choose that standard for selecting employees for lay off? There is, after all, any number of criteria that could have been used as a basis for the selection for layoff. As pointed out above, Respondent maintains an extensive performance appraisal system. Seniority also is often used in such circumstances. This is not to say that Respondent is required to use any particular standard. But it cannot select a standard that is design to result in the termination of union adherents.

In examining this issue, it is important to note that Respondent knew that the selection of this standard would result in the termination of the core of union adherents on the first shift. This was so because those employees already had more writeups than other employees did. Perhaps more importantly, the evidence shows that Respondent urged the shift foremen to search for reasons to issue writeups to the union supporters. This fits neatly with the notion that Respondent decided to use this standard as a means for terminating those employees. I also note that there is no written policy that sets forth a predetermined decision to use this standard in the event of layoffs. Although there is no history of layoffs that can provide evidence of a past practice, the evidence shows that only weeks earlier Respondent used seniority as the basis for selecting Lamatsch for lay off. Respondent's proof on the nondiscriminatory selection of this criterion rests squarely on Teagan's testimony. But that testimony is uncorroborated by other documentary or testimonial evidence. It is against the weight of other credible evidence and Teagan's demeanor was unconvincing. Under these circumstances I do not credit that testimony. I conclude that Respondent chose this standard as part of an unlawful scheme to terminate the employees who had supported the Union. It follows that Respondent has failed to show that it would have terminated these employees even if they had not supported the Union.

Additional analysis is needed concerning the cases of Otte and Schaff. I have described above how Otte and Schaff signed the severance agreement and were then terminated. The General Counsel alleges that Respondent entered into the severance agreement with Otte and Schaff because those employees supported the Union. The General Counsel argues that the severance agreement package:

> formed an integral part of Respondent's plan . . . to rid itself of the employees who had supported the Union in 1999 and thus to foreclose the Union's return. Respondent pushed the severance package precisely in order to rid itself of union support(ers), as it disclosed to Lamatsch in October or November. The severance package is not severable from the decision to lay off employees as a whole: the same notice announced both the severance and the selection criterion for layoff, making clear that the layoff would proceed if the severance (agreement) was undersubscribed. Moreover, even if *no* employees had accepted the severance, the exact same group of employees, including Otte and Schaff, would have been laid off under Respondent's selection criterion. . . . Employees—particularly those Union supporters who were clearly subject to layoff without accepting the severance—who accepted the severance were no less the victims and targets of Respondent's

> discriminatory reduction in force that those who refused to take the severance and were laid off a week later. The integral role of the (release) in Respondent's larger pattern of . . . coercion . . . makes clear that its purpose was to coerce both the employees who signed it from exercising their rights to participate in Board proceedings.

The evidence fully supports this conclusion. I find that the severance package was another part of Respondent's plan to rid itself of the employees who supported the Union. The fact remains that Otte and Schaff accepted the severance package, thus raising the question of whether the Board should defer to that agreement as a private settlement of the allegations raised in the complaint. *Hughes Christensen,* supra. However, the facts and conclusions set forth above compel the rejection of the notion that the severance package should serve as a settlement of the allegations raised in the complaint concerning Otte and Schaff.

By terminating Patrick Anthony, Michael Washington, Donald Bennett, Thomas Wentz, Antwion Lee, Carl Schaff, Fred Otte, and Marco Castillo because they supported the Union Respondent violated Section 8(a)(3) and (1).

CONCLUSIONS OF LAW

1. By soliciting employee grievances and implying that those grievances would be remedied if the employees rejected the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By conditioning acceptance of the severance package on the requirement that employees not participate in the Board's investigative process, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By terminating Patrick Anthony, Michael Washington, Donald Bennett, Thomas Wentz, Antwion Lee, Carl Schaff, Fred Otte, and Marco Castillo because they supported the Union Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent violated the Act by conditioning acceptance of the severance package on the requirement that employees not participate in the Board's investigative process, I shall require that Respondent to rescind that portion of the release and notify each employee who signed the release, in writing, that it has done so. Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]